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# Jessup Thomas et al v. Karl V. King et al : Brief of Respondents

Utah Supreme Court

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Dallas H. Young; Young, Young & Sorensen; Attorneys for Defendants and Respondents;

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**In the Supreme Court of the  
State of Utah**

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JESSUP THOMAS and IRENE THOMAS,  
his wife; WILLIAM H. VAN TASSELL and  
APHNE VAN TASELL, his wife; ORVEN J.  
MOON and DELPHIA N. MOON, his wife;  
and EDWIN CARMAN,

**FILED**

**AUG 30 1956**

Plaintiffs and Appellants, Supreme Court, Utah

vs.

KARL V. KING, as Administrator of the Es-  
tate of HANNAH J. BRAFFET, Deceased;  
DALLAS H. YOUNG, JR., as Administrator  
with the will annexed of the Estate of JOHN  
MAXCY ZANE, Deceased; THE CONTI-  
NENTAL BANK & TRUST COMPANY OF  
SALT LAKE CITY, as Administrator of the  
Estate of DAVID G. SMITH, Deceased;  
JUANITA G. SMITH, surviving wife of DA-  
VID G. SMITH, Deceased; HELEN B.  
MOTT; L. L. PACK and NORA E. PACK,  
his wife; W. H. COLTHARP and ORAL  
COLTHARP, his wife,

Defendants, Intervenors,  
and Respondents.

**CASE  
NO. 8519**

**RESPONDENTS' BRIEF**

DALLAS H. YOUNG,  
YOUNG, YOUNG & SORENSEN,  
Attorneys for Defendants and  
Respondents

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# In the Supreme Court of the State of Utah

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JESSUP THOMAS and IRENE THOMAS,  
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his wife; W. H. COLTHARP and ORAL  
COLTHARP, his wife,

Defendants, Intervenors,  
and Respondents.

**CASE**  
→ **NO. 8519**

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## RESPONDENTS' BRIEF

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### STATEMENT OF FACTS

We agree generally with the Statement of Facts set forth in appellants' brief, but we think it might be helpful to further delineate them.

In this action, as well as in the previous actions filed by appellants against respondents, to which reference will hereafter be made, appellants seek to quiet title to 600 acres of desert land in Duchesne County, Utah. Mark P. Braffet formerly owned this land, he being the grantee of the patent. During his lifetime he conveyed to different parties undivided interests in the land, the total of these grants amounting to an undivided two-thirds interest. Among the grantees was John M. Zane, to whom he conveyed an undivided one-sixth interest. Mark P. Braffet's wife, who was then living, did not join in any of these conveyances. The taxes were not paid by anyone, and in 1929 all the land was sold for delinquent taxes. In 1945, Duchesne County conveyed its interest to appellant Jessup Thomas, and in the same year Maude Braffet White Waring, a daughter of Mark P. Braffet, who had received a conveyance to said property by a decree of distribution in the estate of Mark P. Braffet, conveyed her interest to David G. Smith. Since that time, Thomas and Smith have each conveyed part of their interests, Thomas to the other named appellants and Smith to Helen B. Mott, L. L. Pack and Horace Coltharp. Hereafter, for the sake of brevity, when reference is made to Smith and his three grantees, they will be referred to as the Smiths.

## PLEADINGS

The complaint in this case is a short form seeking merely to quiet title to 600 acres of land. There were a number of defendants named in the complaint and summons, but service of summons was made only on the respondents David G. Smith, L. L. Pack, W. H. Coltharp and their wives, and on Helen B. Mott.



The complaint alleges that the respondents claim some right, title and interest in the land described in the complaint, and the Smiths filed their answers, in which they admitted the same, and in their prayer asked to have an undivided one-third interest in the land quieted in them subject to any right that Maude Braffet White Waring might have in the oil, gas and mineral rights. Karl V. King, as administrator of the estate of Hannah J. Braffet, deceased, and Dallas H. Young, Jr., as administrator with the will annexed of the estate of John Maxcy Zane, deceased, intervened in the case without objection on the part of the appellants. We will make no further reference to the claim made by Karl V. King as administrator of the estate of Hannah J. Braffet, because the administrator has conceded and the court has found that there was no basis for such claim, and this issue is not before the Court.

In the motion of intervention filed by the administrator of the John Maxcy Zane estate, the issue was raised as to whether the dismissal of the actions against the Zane estate operated as an adjudication upon the merits.

The defenses interposed by the Smiths and the motion filed by intervenor Zane are different, but for sake of convenience the cases were consolidated for trial. The case was tried on the complaint of the appellants, the answer of the Smiths, and the motion of the intervenors. Appellants did not plead the statute of limitations. Counsel for appellants and respondents and the court, on the trial of the case and in all briefs which were submitted by counsel for each of the parties, proceeded as though the statute had been pleaded and as though a plea in avoidance had been interposed by the respondents Smiths.



The case was first heard on the 26th day of April, 1954, and the court found the issues in favor of the Smiths and the two intervenors. Later counsel for respondents informed the court that they were of the opinion that the judgment in favor of the administrator of the Hannah J. Braffet estate could not be sustained, and the court granted a new trial as to all parties. The trial from which this appeal is taken was heard on the 25th day of April, 1955, and at the commencement of the trial, appellants filed what they denominated a reply to respondents' answers.

## **STATEMENT OF POINTS**

### **POINT I**

THE FAILURE OF THE DUCHESNE COUNTY AUDITOR TO ATTACH HIS AFFIDAVIT TO THE ASSESSMENT ROLL IN THE YEAR 1929 VOIDED THE TAX SALE MADE BY DUCHESNE COUNTY.

### **POINT II**

THE EVIDENCE SUPPORTS THE FINDING OF THE COURT THAT THE STATUTE OF LIMITATIONS, UPON WHICH APPELLANTS RELIED, WAS TOLLED BY THE FILING OF CIVIL ACTION NO. 2693 AND THE ANSWER AND APPEARANCE OF THE RESPONDENT SMITHS IN SAID ACTION FROM JULY 27, 1951 TO JUNE 23, 1952 AND BY THE FILING OF CIVIL ACTION NO. 2764 AND THE ANSWER AND APPEARANCE OF THE RESPONDENTS SMITH IN SAID ACTION FROM JUNE 25, 1952 UNTIL THE PRESENT TIME.

## POINT III

THE EVIDENCE AND THE LAW SUPPORT THE FINDING OF THE COURT THAT THE DISMISSAL OF CIVIL ACTIONS NOS. 2663, 2693 AND 2674 WAS AN ADJUDICATION UPON THE MERITS AS FAR AS THE ESTATE OF JOHN MAXCY ZANE, DECEASED, IS CONCERNED.

## POINT IV

THE ESTATE OF HANNAH J. BRAFFET, DECEASED, HAS NO RIGHT, TITLE OR INTEREST IN THE LAND DESCRIBED IN THE COMPLAINT AND IN THE FINDINGS OF FACT.

**ARGUMENT**

## POINT I

THE FAILURE OF THE DUCHESNE COUNTY AUDITOR TO ATTACH HIS AFFIDAVIT TO THE ASSESSMENT ROLL IN THE YEAR 1929 VOIDED THE TAX SALE MADE BY DUCHESNE COUNTY.

The stipulation entered into between appellants and respondents in open court shows that the auditor's affidavit was not attached to the assessment roll for the year 1929. Under the rule laid down in the case of *Telonis v. Staley*, 114 Utah 537, 144 Pac. 2d 513, the tax title received by appellants is void.

Our Supreme Court has stated that in an action to quiet title, plaintiff must succeed by virtue of the strength of his own title and not by the weakness of the defendants' title. *Babcock v. Dangerfield*, 98 Utah 10, 94 Pac. 2d 862.

## POINT II

THE EVIDENCE SUPPORTS THE FINDING OF THE COURT THAT THE STATUTE OF LIMITATIONS, UPON WHICH APPELLANTS RELIED, WAS TOLLED BY THE FILING OF CIVIL ACTION NO. 2693 AND THE ANSWER AND APPEARANCE OF THE RESPONDENT SMITHS IN SAID ACTION FROM JULY 27, 1951 TO JUNE 23, 1952 AND BY THE FILING OF CIVIL ACTION NO. 2764 AND THE ANSWER AND APPEARANCE OF THE RESPONDENTS SMITH IN SAID ACTION FROM JUNE 25, 1952 UNTIL THE PRESENT TIME.

We now direct our remarks to the question as to whether the statute of limitations has been tolled, but in reciting the evidence relating to this question, reference of necessity will have to be made to evidence which also applies to the Zane estate.

The record shows that the appellants filed their first action against the Smiths and the other respondent in the District Court of the Fourth Judicial District in Duchesne County on May 22, 1946, Civil No. 2263. The Smith interests appeared in said action through Mr. Henry Ruggeri of Price, Utah. On the 10th day of October, 1949, the attorney for the appellants moved that the action be dismissed. Upon said motion the action was dismissed. Again on June 23, 1952, the firm of Stanley and Lewis moved the court for dismissal of the same case, and order for dismissal was signed by the court.

On July 27, 1951, Civil Action No. 2693 was filed by the appellants against all the respondents named in the present action. To this complaint the Smith interests filed

an answer on August 20, 1951. On May 3, 1952, appellants filed what they denominated a reply to this answer, and on June 23, 1952, the attorneys for appellants moved the court for an order dismissing the action without prejudice, and on said day the action was dismissed.

Two days thereafter, to-wit: June 25, 1952, the same appellants filed Civil Action No. 2764, the present action, against the respondents named in the actions theretofore dismissed. Pursuant to stipulation, attorneys for the Smith interests entered their appearance. On the 14th day of September, 1953, attorneys for appellants and the Carter Oil Company moved to dismiss the action as to all respondents, except the Smith interests. The motion to dismiss was granted.

As to the Smiths, the trial court found that the commencement of Civil Action No. 2693 by the appellants and the answer of the Smiths tolled the statute of limitations from July 27, 1951, until it was dismissed on June 23, 1952, and that the filing of Civil Action No. 2764 on June 25, 1952 and the filing of the answer by the Smith respondents has tolled the action since that time.

The general principle of law is that the filing of a complaint tolls the statute of limitations. In support of this proposition, we quote from Am. Juris., Vol. 34, Section 247, page 202:

“It is a firmly established rule that the commencement of suit prior to the expiration of the applicable limitation period interrupts the running of the statute of limitations as to all parties to the action and their privies, not only as to causes of action set forth in the complaint or petition, but also as to all defenses which may be interposed by the defendant. And by appli-

cation of the principle, when, by amendment to the pleadings in a pending action, a person is brought into that action as an additional party defendant, the statute of limitations ceases to run as to him from that time. Lapse of time cannot be relied upon to bar a suit in equity which is auxiliary to an action already commenced at law, if the latter was brought within the time limited.

“The bringing by a claimant in adverse possession of land, of an action involving title thereto which is based on the existence of a right in another is such a recognition of that right as will arrest the running of the statute of limitations in favor of the occupant and against such right. However, it is only as to the right claimed by the defendant in an action by the claimant in possession that the running of the statute is arrested.”

As authority for the last sentence, the case of *Welner v. Stearns*, 40 Utah 185, 120 Pac. 490, is cited. Counsel for appellants, in his brief, states that the *Welner v. Stearns* case, (*supra*) is directly in point on the question as to whether the statute was tolled by the filing of Civil Action No. 2693. Because the facts are different in the *Welner v. Stearns* case (*supra*), we do not think the case is squarely in point, but we do believe that the rationale contained therein sustains the position reached by the trial court in this case. We think a recital of the facts in the *Welner v. Stearns* case (*supra*) may be of assistance to the Court.

Welner purchased certain lots in Salt Lake County in 1898, the lots having been sold for taxes, and took possession thereof in 1899. He enclosed the lots within a fence and made other improvements thereon. In November, 1903, Welner commenced an action against Amanda Stearns, she

being the owner of the lots at the time they were sold to Salt Lake County for delinquent taxes, to quiet title to the lots. The District Court of Salt Lake County entered a decree quieting title to the lots in Welner. Subsequently, Mrs. Stearns conveyed her interest to Addison Cain and Cain conveyed his interest to Peter Borg. Borg filed suit to set aside the decree obtained by Welner, and in 1906 the decree was set aside. In 1910, Welner started an action to quiet title, alleging that he was the owner of the property by reason of adverse possession for more than seven years and the payment of taxes for that period. Borg's defense was that the seven year period had been interrupted by filing of the action by Welner in 1903. The lower court held with Borg. The Supreme Court reversed the trial court's decision, and in discussing the question as to whether the seven year period of limitation has been arrested, states as follows:

**"We confess our inability to understand how the bringing of an action by appellant, without any appearance by the defendant or any claim adverse to his rights, could have such effect. No doubt, if, after inviting Alminda Stearns into court, she had appeared in the action, and had disputed appellant's title, the running of the statute, for the purpose of that action at least, would have been arrested. It is not true that the commencement of an action, under all circumstances, arrests the running of the statute of limitations. It is settled law that in case new parties are brought into a pending action as defendants, the statute of limitations runs in their favor up to the time they are brought into the case."** (Emphasis ours)

In the Welner v. Stearns case (*supra*), the purchaser at the tax sale filed his complaint naming the record owner



as party defendant, but no proper service was ever made upon her. Welner had been in possession of the property for a number of years. In this case the court found that appellants had not been in possession. In the Welner case no appearance was made by the defendant. In the present case the Smiths appeared and filed their answer asking that title be quieted in them, so that the rationale as set forth in the Welner v. Stearns case (*supra*), clearly sustains the decision reached by the trial court. We submit that the position of the respondents is the same as though they had initiated the action and had joined the appellants as party defendants. Had this procedure been followed, could anyone seriously contend that the statute was not tolled?

Again adverting to appellants' contention that Civil Action No. 2693 was erroneously admitted because the respondents Smiths had not made a plea in avoidance of the statute of limitations, we call attention to the fact that appellants never raised this question of limitations except by a pleading which they termed as a reply filed at the commencement of the last trial. We understand the purpose of reply is to deny new matters raised in the answers, and respondents raised no matters in their answer which required a reply.

Respondents do not seek to take advantage of the fact that appellants never properly pleaded the statute of limitations, but we assert that appellants are in no position under the record to raise the objection that respondents failed to make a plea of avoidance. In support of our position, respondents call attention to Rule 7(a), U. R. C. P., which reads as follows:

“Pleadings. There shall be a complaint and an answer; and there shall be a reply to a counterclaim



denominated as such; an answer to a cross-claim, if the answer contains a cross-claim; a third party complaint, if leave is given under Rule 14 to summon a person who was not an original party; and there shall be a third party answer, if a third party complaint is served. No other pleading shall be allowed, except that the court may order a reply to an answer or a third party answer."

We also invite the Court's attention to Rule 8, (d) and (f), U. R. C. P.:

"(d) Effect of Failure to Deny. Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading. Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided."

"(f) Construction of Pleadings. All pleadings shall be so construed as to do substantial justice."

### POINT III

THE EVIDENCE AND THE LAW SUPPORT THE FINDING OF THE COURT THAT THE DISMISSAL OF CIVIL ACTIONS NOS. 2663, 2693 AND 2674 WAS AN ADJUDICATION UPON THE MERITS AS FAR AS THE ESTATE OF JOHN MAXCY ZANE, DECEASED, IS CONCERNED.

The facts are not in dispute that in all actions filed by plaintiffs in which they sought to quiet title to the land in question, the same land is described, and John M. Zane and his heirs were named as party defendants. The facts are also not in dispute that Civil Action No. 2263 was, by the

plaintiffs, dismissed either in 1949 or in 1952. There is no question that Civil Action No. 2692 was dismissed on June 23, 1952, and that Civil Action No. 2764, as to Zanes, was dismissed on September 14, 1953.

Counsel for appellants contends that these actions were dismissed by the court and not by the appellants. For the Court's convenience we set forth Rule 41 (a) (1), U. R. C. P.:

“Subject to the provisions of Rule 23(c), of Rule 66, and of any applicable statute, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.”

This rule, which became effective January 1, 1950, has not been interpreted, so far as we know, by any of the western states. We believe the case of Robertshaw-Fulton Controls Company v. Noma Electric Corporation, reported in 10 F. R. D. 32, sets forth the law which applies in this case. This case was decided January 23, 1950, and the action arose in the United States District Court, Department of Maryland. We quote the applicable portions of the court's opinion:

"The material facts are as follows: On November 5, 1948, the plaintiff, a Delaware Corporation, filed suit in this court against the defendant, a Maryland corporation, seeking a declaratory judgment . . . with respect to the rights of plaintiff and defendant in certain patents . . . Previously, that is, on September 7, 1948, plaintiff had filed a similar suit in the District Court for the Southern District of New York against another, the parent company, bearing the same name but incorporated under the laws of New York. This suit had been brought under the belief that the New York corporation and not the Maryland corporation owned the patents involved. However, upon being informed to the contrary, plaintiff brought suit in this court against the Maryland corporation and shortly thereafter, that is, on November 18, 1948, dismissed the New York action.

". . . on July 22, plaintiff filed notice of dismissal of the present suit, this notice stating that 'pursuant to the provisions of Rule 41(a), plaintiff hereby dismisses the above-entitled case without prejudice and without costs. Two days earlier, that is, on July 20, 1949, plaintiff had instituted another suit against the New York Corporation in the District Court for the Southern District of New York on the same claim. Thereupon, on August 3, defendant filed a motion in the proceeding in this Court to strike out plaintiff's notice of dismissal of July 22, or, in the alternative, for an order dismissing the action with prejudice pursuant to Rule 41(a). Defendant has also filed a similar motion in the third suit in the District Court for the Southern District of New York seeking dismissal of that suit on the ground that plaintiff having dismissed the first suit brought in that court, its filing of the notice of dismissal in the suit in this, the Maryland District Court, amounts to an adjudication on the merits under Rule 41(a). The motion in the District Court

in New York came on for hearing on October 25, 1949, but after arguments of counsel thereon, the Court declined to dispose of the matter pending a decision on the similar motion filed in this Court. On December 8, plaintiff filed in this Court notice of withdrawal of its notice of dismissal of its suit filed on July 22, defendant's motion filed August 3 having already been set for hearing on the following day, December 9.

"At the hearing of defendant's motion which, as above stated, was framed in the alternative, namely, that (1) plaintiff's notice, filed July 22, of its dismissal of the present suit be struck out or (2) that this notice of dismissal be declared to operate as an adjudication on the merits and that the dismissal was therefore with prejudice, defendant insisted that it was entitled to an order of this Court to the latter effect.

"After full consideration . . . The Court reaches the conclusion that defendant's position is correct and that, therefore, it is entitled to an order dismissing the present action with prejudice.

"We find no ambiguity in the words employed in Rule 41(a) and we have no doubt that the Rule applies to the present situation. This part of the Rule relates to voluntary dismissal of actions, that is, by plaintiff or by stipulation, without order of Court. After describing the two ways in which such dismissal may take place, namely, (1) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment; whichever first occurs, or (2) by filing a stipulation of dismissal signed by all parties who have appeared in the action, the Rule provides that 'Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, **except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of**

**the United States or of any state an action based on or including the same claim.'** (Emphasis supplied). It is clear from this language that the plaintiff in the present case could not, by the mere recital in its notice of dismissal of July 22, 1949, that such notice is 'without prejudice and without costs,' defeat the express language of the Rule above quoted. The present plaintiff had, prior to July 22, 1949, that is, on November 19, 1948, dismissed that action which it had filed in the District Court for the Southern District of New York 'based on or including the same claim' as that involved in the present suit in this court."

Another case in point is that of *Hineline v. Minneapolis Honeywell Regulator Company*, 78 F. 2d 854. The Federal Court in that case was required to interpret a Minneapolis statute, the state court having failed to rule upon the matter before the Federal Court. The section from the statute requiring interpretation reads as follows:

"An action may be dismissed, without a final determination of its merits, in the following cases:

"1. By the plaintiff at any time before the trial begins, if a provisional remedy has not been allowed, or a counterclaim made or other affirmative relief demanded in the answer: Provided, that an action on the same cause of action against any defendant shall not be dismissed more than once without the written consent of the defendant or an order of the court on notice and cause shown;"

The appellant, *Hineline*, brought an action against the Minneapolis Honeywell Regulator Company in the State Court to recover for services alleged to have been rendered that company at its request. The action was removed to the United States District Court for the District of Minne-

apolis because of diversity of citizenship. The case was set down for trial. At the time appointed for the trial, plaintiff stated he was not ready for trial and could not proceed. Defendant moved for dismissal and, by order of the court, the case was dismissed without prejudice. Later, plaintiff commenced another action on the same cause of action, in the same State Court against the same defendant. The case was also transferred to the Federal Court. The issues were joined and the case was set for trial. The defendants prepared for trial and four days before the case was to be heard, plaintiff filed a notice of voluntary dismissal without prejudice of his action. Upon motion of the defendant, the notice to dismiss was stricken and the court ordered the trial to be heard on the date first fixed. On the date of the trial, it was discovered that the plaintiff had filed another like notice of dismissal without prejudice. The court called the case for trial. The plaintiff did not appear. On motion of the defendant the second notice of dismissal was stricken from the files. The court directed a verdict and ordered judgments for the defendants for their costs. From that judgment the appeal was taken. We quote from the court's opinion:

“The plaintiff contends that he had the absolute right to arbitrarily dismiss without prejudice his second case, and that he did so, but that, even if it should be held that he did not or could not voluntarily so dismiss, nevertheless the court was without power to dispose of the case upon its merits in his absence. The defendants contend that the plaintiff had no right to arbitrarily dismiss, without prejudice, his second case, and that the procedure adopted by the court below was proper.”

The court stated:

“The statute, (*supra*), grants the plaintiff, frequently to the prejudice and much at the expense of the defense, the indulgence of one arbitrary dismissal.

. . . It thus appears that a plaintiff who has enjoyed his one arbitrary dismissal and has recommenced his action is then substantially in the same position as one against whom a provisional remedy has been allowed, a counterclaim made, or affirmative relief demanded in the answer. *Walker v. St. Paul City Ry. Co.*, 52 Minn. 127, 130, 53 N. W. 1068. He has an action which he cannot dismiss except upon its merits unless for cause shown or by consent of the defendant.” Quoting further:

“We are satisfied that, under the practice in Minnesota, when a plaintiff who has lost his right to dismiss without prejudice, and who, under the pleadings, has the burden of proof, fails or refuses to proceed to trial, the proper course for the court to pursue is to enter a judgment of dismissal of the case with prejudice.”

Taking the testimony in the light most favorable to appellants, there have been three dismissals against the John M. Zane estate, one of which would be prior to January 1, 1950, when Rule 41(a) was adopted. There are authorities which hold that even though one or more of the dismissals had been made prior to the adoption of the Rule, a dismissal subsequent to the adoption of the Rule operates as an adjudication upon the merits.

We call attention to the case of *Cleveland Trust Company v. Osher and Reiss*, 31 F. Supp. 985, and particularly page 1009. This is a patent infringement suit involving many patents, all of which bear different names, and the



Court, in its opinion, treats the facts and the law as to each patent separately. Among the patents was the Aldrich Patent and in this case there had been two dismissals prior to the adoption of Rule 41(a) and none thereafter. Nevertheless, the defendant contended that the second dismissal operated as an adjudication upon the merits. The court said:

“There cannot be a dismissal on the merits unless subsequent to the date the rule went into effect a notice of dismissal was given.”

The court further stated:

“The prior dismissals gave the opportunity to make the rule effective, if, subsequent to the effective date of the rule the notice was given. This does not change the effect of the action of the plaintiff in dismissing the action prior to the effective date of the Rule, but would make the notice given subsequent to the effective date of the rule a voluntary action on the part of the moving party, with notice, on which the rule would be applied.

“No notice of dismissal after the rule went into effect was given, but the action was brought on for trial and that motion is denied.”

The court then discusses what is termed the Frenier Patent, and the defendant asked in that case that the suit be dismissed on the merits. The facts show that there was a dismissal prior to the Rule taking effect and one after the Rule went into effect. The court held that the second dismissal was on the merits. The court states:

“The purpose of Rule 41 was to prevent the delays in litigation by numerous dismissals without prejudice.”

As we understand appellants' position it is that the dismissals made by appellants against the Zane estate do not fall within Rule 41(a) because (1) they were dismissals made by the court, and (2) that when the Zane estate made a motion asking that the court find that the second dismissal was an adjudication upon the merits, that the case was reinstated as far as the Zane estate is concerned. We shall first discuss proposition (1).

There is no question under the record that the Zane estate had never served an answer or motion for summary judgment prior to the time of the dismissals, and there had been no stipulation for dismissal. Further, there is no dispute that all dismissals were made upon motion of the attorneys for appellants. True it is that the court granted the motion made by appellants. The question is then posed, could the attorney for appellants circumvent the rule of law by proceeding as he did?

We do not know what impelled counsel for appellants to dismiss the cases in the manner in which they were dismissed. It may be that counsel was not familiar with Rule 41(a), or, being familiar, may have forgotten the effect thereof, but assuming the facts most favorable to appellants, let us assume counsel was familiar with the rule and purposely followed the procedure which was followed. That can avail him nothing because he, as well as the courts, are bound by the rules of law and procedure the same as litigants, and what the court did in this case cannot have the effect of bringing the dismissals under paragraph 2 of Rule 41. Appellants and their counsel are charged with notice of the law and in this case no responsive pleading had been filed by the Zane estate, and the dismissals were under Rule 41(a).

Rule 41 is discussed in Barron and Holtzoff's Federal Practice and Procedure, volume 2, page 614 and following. At page 615, note 14, the following appears: "Under Rule 41(a), plaintiff's right to dismiss generally, before service of answer or of motion for summary judgment is absolute, and is accomplished merely by filing of notice of dismissal, although after such service plaintiff may not dismiss except upon order of court and upon such terms as court deems proper. *Wilson and Co. v. Fremont Cake and Meal Co.*, D. C. Neb. 1949, 83 F. Supp. 900." Other cases are cited to the same effect.

For a dismissal to be operative under Rule 41(a) (1) it need not apply to all of the defendants. A second dismissal against some but not all of the defendants operates as an adjudication upon the merits so far as those defendants against whom there is a second dismissal are concerned. *Friedman v. Washburn Co.*, 145 F2d 715, at pages 718-19.

The notice of dismissal provided by Rule 41(a) (1) is new to our practice. Notice of such dismissal need not be given. The notice is merely filed in the action by the plaintiff. "The plaintiff's notice of voluntary dismissal before the service of an answer or motion for summary judgment need only be filed with the clerk and is not required to be served on the other parties. It is merely a notice and not a motion, although a notice in the form of a motion has been held sufficient for the purpose." Barron and Holtzoff, Federal Practice and Procedure, volume 2, page 618; *Silver v. Indemnity Ins. Co. of North America*, D. C. Conn. 1948, 80 F. Supp. 541.

On the facts of this case, the appellants had the absolute right to dismiss against the Zane interests.

The gist of the argument of appellants is that the rules may be circumvented by failing to comply with them. It is to be noted that there is no provision in Rule 41(a) which allows the court to make an order of dismissal where the defendant has not answered or filed a motion for summary judgment. The recitals in the orders of dismissal that the dismissals are without prejudice cannot be of significance. If it were otherwise, then the parties and the court may defeat the operation of the rules by placing something in the order of the court contrary to the provisions of the rules. As we have pointed out, the dismissals, if they are effective against the Zane estate, must have been made pursuant to Rule 41(a) (1). "A recital in the motion of dismissal of a second action that it is without prejudice does not prevent its operation as an adjudication upon the merits." Page 146 of the 1954 Pocket Supplement to Barron & Holtzoff, Federal Practice and Procedure; Robertshow-Fulton Controls Co. v. Noma Electric Corp., (supra).

In support of what we have just said, we invite attention to the case of *White v. Thompson*, 80 F. Supp. 411. The facts in the case are very brief. This was an action against a railroad, and the railroad made a motion to dismiss on two grounds. First, that the prosecution of the case in any other location outside the State of Arkansas constituted an unreasonable burden upon interstate commerce, and second, that the prosecution in the Federal Court of Illinois was inconvenient, inequitable, burdensome and oppressive to the defendant. The court granted defendant's motion ordering the case transferred to Arkansas. Within the ten day period limited in the court's memorandum, the parties simultaneously presented motions. The plaintiff move the court to dismiss the case without preju-

dice. The defendant moved the court to transfer the case to Arkansas. It was the contention of the defendant that the dismissal should be upon terms, and was under paragraph 2 of Rule 41. We quote from the court's opinion:

"The plaintiff has moved the court to dismiss the cause and, therefore, should, it is assumed, be held to be a proceeding under Rule 41(a)(2). But, upon considerations of the question as to what "terms and conditions" should be imposed on the dismissal, it is proper that the court consider the terms of Rule 41(a)(1). No answer has been filed in this case, neither has a motion for summary judgment been filed. Therefore, the plaintiff probably had the right to file a notice of dismissal under Rule 41(a)(1). Since he had this right, it seems to the court that "terms and conditions should not be imposed upon the dismissal. Accordingly, the motion of the plaintiff to dismiss without prejudice, at plaintiff's costs, will be granted. An order to that effect has this day been made."

Under the title "C. Evidence," appellants' brief, appellants contend that the court erred in admitting Civil Action 2693 because "it is not within the issues of the case", and secondly, "there is no pleading to warrant introduction of the file in this case." There are at least three reasons why there is no merit to this contention: (1) The Rules of Civil Procedure do not require one to plead evidence. We pleaded more than was necessary when we pleaded the dismissal of Civil Action Nos. 2693 and 2764 as to the Zane estate; (2) The pleadings fully advised appellants of the Zane defense; and (3) We believe that under the rules and under the decided cases, we were not required to file any pleadings on behalf of the Zane estate, and that it was not necessary for appellants to be present to authorize the

court to enter judgment on the merits against appellants.

When the second dismissal was made, the case against the Zane estate was terminated, and there was nothing for the court to do but enter judgment in favor of the estate. There was nothing appellants or the court could do to revive the action.

#### POINT IV

THE ESTATE OF HANNAH J. BRAFFET, DECEASED, HAS NO RIGHT, TITLE OR INTEREST IN THE LAND DESCRIBED IN THE COMPLAINT AND IN THE FINDINGS OF FACT.

The propositions posed by Points IV and V of appellants' brief is illustrative of the dilemma with which the respondents were confronted during all of these proceedings. The contentions made by appellants are not new. They were urged upon the trial court in the first briefs submitted by appellants. The trial court, wisely, in our opinion, failed to make any findings or conclusions respecting appellants' contentions. There is absolutely no pleading by any of the parties which raise these issues. It is true that the question has been raised by appellants in their briefs and that we filed briefs answering those contentions. We did this for the same reason that we never made any issue of the fact that appellants had not pleaded the statute of limitations, the reasons being that we felt that we had a defense so far as the statute of limitations was concerned and that there was nothing to appellants' contention regarding the propositions raised in Points IV and V. However, appellants having raised the issue again, we again deem it necessary to make a short reply thereto.



First, we submit that if the Smiths are barred by the statute of limitations, they do not care who is the owner of the land in question. On the other hand, if the Court holds that the decision of the lower court should be affirmed as to the Smiths, it can be of no concern to the appellants what are the respective rights of the Smiths and Maude White Waring.

Second, appellants are attempting to make a collateral attack upon a decree of the Seventh Judicial District Court of Carbon County entered in that court on August 10, 1927, without any pleadings of any kind raising that issue. (See Plaintiff's Exhibit C for Decree of Distribution, pages 148-152).

Third, assuming for the sake of the discussion, that appellants had, by proper pleading and process, joined the Hannah J. Braffet estate and the three children of Mark P. Braffet in this case, the law will not support appellants' contentions. Appellants cannot be in a more favorable position to attack the Decree of Distribution entered in the Mark P. Braffet estate than Hannah J. Braffet would be if she were living. Plaintiffs' Exhibit C, page 81, shows that Mark P. Braffet left an estate having an appraised value of more than \$41,000.00, the real estate having an appraised value of more than \$28,000.00, and the value of the property in litigation was fixed at \$150.00. The appraised value of the property distributed to Hannah J. Braffet was real property \$17,600.00, and personal property \$3,900.00.

There was distributed to Maude White Waring property having a total appraised value of \$3,900.00. The other property was distributed to the two sons of the Braffets. All of the property was distributed in accordance with the



petition filed with the court, the contents of which Hannah J. Braffet and the children approved. This is shown by Plaintiffs' Exhibit C, pages 103 to 111.

It is evident in this case that the widow and her children entered into an agreement for the division of the property left to them upon the death of Mark P. Braffet, and that the court, pursuant to that agreement, distributed the property in question to Maude White Waring. We submit that all of the courts give effect to family agreements unless there is fraud in connection therewith. Authorities for this proposition will be found in Vol. 4 of Bancroft's Probate Practice, 2nd Edition, Section 1150, page 444. Among the cases cited therein is one from California, in *Re Howe Estate*, 199 P. 2d 59:

"Stipulations concerning the amount to be considered community property and to determine the widow's share thereof, if not illegal or contrary to policy, are not only approved by the law but the courts seek to sustain rather than overturn such compromise measures."

This question is annotated in A. L. R. and the most recent cases we have found therein are those cited in 54 A. L. R. 976. Among the cases cited is the case from Georgia reported in 134 S. E., 194, in which it was held that an agreement between the widow and the heirs of an estate that she take a stipulated portion of the estate in lieu of her rights as a widow, including the provisions for an heir's support, would be upheld against her later repudiation in the absence of the showing of **fraud or mistake**.

"An agreement between the widow, heirs, next of kin, all being adults, as to certain matters in the

settlement of an intestate's estate, was held to be a valid and binding agreement." 207 S. W. 209.

"The law looks with favor on family compromises or agreements or the settlement of intestates' estates, and when no right of creditors intervenes, such agreements if free from fraud, are upheld and enforced by the courts." 176 N. W. 547.

"The law favors compromises and settlements among the heirs, distributees, devisees and legatees of the decedent's estate and will enforce such agreements when made between persons having the legal capacity to contract." 21 A. J. Sec. 21, page 381.

Also, see 16 Am. Jur., Sec. 145, page 925.

A compromise and settlement among heirs, distributees, devisees and legatees of an intestate's estate, where free from fraud, are favored and enforced by the law subject to the rights of creditors. Citing a case from Georgia, 178 S. E. 52, we quote from the syllabus:

"Where consent division of an estate has been made between distributees, each distributee ipso facto acquires a perfect equity in the property set apart to him and loses all interest in that assigned to the other distributees."

Another case cited is from Kansas, *Riffe v. Walton*, 182 Pac. 640. We quote from that case:

"No rights of creditors being involved, it is competent for the widow and the heirs of an estate to enter into an agreement for the distribution of an estate on a plan different from that prescribed by the statutes on descents and distributions."

## CONCLUSIONS

The judgment of the trial court should be affirmed for the following reasons:

(1) The failure of the Duchesne County Auditor to attach his affidavit to the assessment roll for the year 1929 voided the tax sale made by Duchesne County.

(2) The statute of limitations upon which appellants rely was tolled by the filing of Civil Actions Nos. 2693 and 2764.

(3) The dismissal by appellants of Civil Actions Nos. 2663, 2693 and 2764 as to the John Maxcy Zane estate operated as an adjudication upon the merits. The dismissal of these actions upon motion of appellants were dismissals under Rule 41(a).

(4) Maude Braffet White Waring acquired a one-third interest in the 600 acres of land in question under the Decree of Distribution in the Mark P. Braffet estate, and appellants' attempted collateral attack upon the Smiths' title is a nullity and of no effect.

Respectfully submitted,

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